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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-369, Misc.

WILLIAM BUCOLO, RONALD SIMPSON and JAMES R. AGUT, *Petitioners,*

vs.

JAMES ADKINS, CHIEF JUSTICE, JOSEPH BOYD, B. K. ROBERTS, BEN OVERTON and ARTHUR ENGLAND, JUSTICES OF THE SUPREME COURT OF FLORIDA and DONALD P. KOHL, JUDGE OF THE PALM BEACH COUNTY, FLORIDA CIRCUIT COURT, CRIMINAL DIVISION, *Respondents.*

PETITIONERS' REPLY TO RESPONSE TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS

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Respondent - State of Florida's restatement of the Question Presented as whether or not "Petitioners can present to this Court by way of mandamus a question not presented to the Florida Supreme Court?" is misleading and fallacious. The true question presented, as stated in Petitioners' Motion (p. 4), is "Whether the Florida Supreme Court's reversal of the obscenity convictions below *accompanied by remand* 'to the trial Court for further proceedings in which the standards established in *Miller v. California* can be applied' violates the Order and Mandate of the Supreme Court of the United States in the case at bar."

Obviously, the significant question involves the *clear meaning of this Court's Order and Mandate*, and this has not only been presented already to the Florida Supreme Court, but their remanding the matter for a new trial represents a plainly erroneous decision. Certainly, the unambiguous meaning of *this* Court's Order and Mandate is a question peculiarly appropriate for *this* Court's decision as part and parcel of this Court's proper exercise of jurisdiction.

Respondent - State of Florida *concedes error* by admitting that "there is no question but that this [United States Supreme] Court in reversing Petitioners' conviction on April 21, 1975, by referring to *Jenkins v. Georgia*, 418 U.S. 157 (1974) and *Kois v. Wisconsin*, 408 U.S. 229 (1972), conclusively determined that the materials disseminated by Petitioners were not obscene as a matter of law." (Response, p. 3)

Respondent argues that Petitioners should have filed a petition for rehearing or similar paper to bring this

matter to the attention of the Florida Supreme Court. In the first place, petitions for rehearing are purely optional in Florida. Second, *Respondent's* duty to seek justice should have required them to petition for rehearing, if they felt such was necessary, once Respondent saw the error of their ways and admitted that it had been conclusively determined that the materials in question are not obscene under our Federal Constitution.

Respondent's argument that Petitioners could have filed a Motion to Quash the Information in the trial Court below is ingenious, but ingenuous. To suggest that an *additional* six or seven years of appellate proceedings in the Florida Courts, under the circumstances involved, seems peculiarly inappropriate (see Petition for Certiorari and Supporting Brief previously filed).

Florida's Speedy Trial Rule, if used by Petitioners to secure relief, as Respondent argues, would not be an adjudication on the merits, an adjudication made by *this* Court but unrecognized by the Florida Supreme Court.

Indeed, the "Nolle Prosse" filed by the Palm Beach State Attorney in the trial court on November 4, 1975 (*after* Petitioners' Mandamus Motion was filed in this Court), gives the following as its Reason: "SUPREME COURT OF THE UNITED STATES REMANDED THIS CASE UNDER GUIDELINES OF MILLER V. CALIFORNIA. THIS CASE NOLLE PROSSED USING *PROSECUTORIAL DISCRETION REGARDING ITS AGE AND LOCATION OF WITNESSES.*" (See Response, Appendix, emphasis supplied.) Petitioners are again denied the favorable adjudication on the merits (of the materials in question as *not* obscene and of their

criminal convictions as *not* Constitutionally valid) to which Petitioners are entitled under *this* Court's Order and Mandate. Instead, they are offered half-hearted non-prosecutions. Anything less than the full exoneration to which this Court's summary reversal entitled them would be unjust and unfair.

The fact of Petitioners' criminal convictions below can be raised during the remainder of their lifetimes as a blot on their records and a dishonor to them and their families.

A definitive Order by this Court, to which even Respondent admits the Petitioners are entitled *substantively*, would be far preferable to carrying copies of this Court's Order and Mandate, and copies of Respondent's Response to the effect that the Order and Mandate conclusively establish the lack of obscenity of the materials Petitioners disseminated, and copies of the *Nolle Prosse* filed in the trial court to future employers, graduate schools, etc. in order to establish their innocence.

In view of the incredibly protracted, complicated and prejudicial proceedings in the within matter, justice demands an end, not a new beginning.

PRAYER

WHEREFORE, Petitioners pray that this Court grant the Petition for Writ of Mandamus for the reasons expressed herein and in the original Petition for Writ of Mandamus.

Respectfully submitted,

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